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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-749

COMMONWEALTH OF KENTUCKY - - Petitioner

versus

HAROLD WHORTON - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No._____

COMMONWEALTH OF KENTUCKY - - *Petitioner*

v.

HAROLD WHORTON - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioner, the Commonwealth of Kentucky, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky reversing the conviction of the respondent in the Jefferson Circuit Court at Louisville, Jefferson County, Kentucky.

OPINION BELOW

The Trial Court rendered no written opinion in this case. The Opinion of the Kentucky Supreme Court was rendered on July 25, 1978 and has not yet been reported. It is printed in the Appendix to this petition beginning at page 13. The Mandate of the Kentucky Supreme Court denying the Petitioner's motion for rehearing and modification appears in the Appendix at page 39.

JURISDICTION

The Judgment of the Kentucky Supreme Court was entered on July 25, 1978. A timely petition for rehearing and modification was denied by that Court on October 10, 1978. The jurisdiction of this Court is invoked pursuant to 28 USC § 1257(3).

QUESTION PRESENTED

Whether the Kentucky Supreme Court Misinterpreted and Misapplied to This Case the Prior Decision of This Court in *Taylor* v. *Kentucky*, 436 U. S. ____, 98 S. Ct. 1930, ____ L. Ed. 2d ____ (1978)?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND THE FACTS

The respondent, Harold Whorton, was convicted in the Jefferson Circuit Court, Criminal Division, Jefferson County, Kentucky, on ten counts of first degree robbery, two counts of first degree wanton endanger-

ment[1] and two counts of first degree attempted robbery. Judgment was entered on the jury's verdict sentencing Whorton to consecutive terms aggregating 230 years of imprisonment.

The charges against Whorton grew out of three separate incidents. During the early morning hours of May 15, 1976, a black male entered a Krispy Kreme Donut Shop in or near Shively in Jefferson County, Kentucky carrying a pistol in one hand and a knife in the other. He proceeded to rob the store and three of its employes. Those three employes subsequently identified Harold Whorton as the robber.

On the evning of the same day a black male carrying a gun in one hand and a knife in the other entered and robbed a Burger Chef restaurant located on Shelbyville Road in Jefferson County, Kentucky. Two of the employes of that restaurant, who were present during the robbery, subsequently identified Harold Whorton as the robber.

One June 1, 1976, near midnight a man entered a Jerry's restaurant on Brownsboro Road in Jefferson County, Kentucky and after ordering some food stuck a gun in the face of a waitress and announced that "this is a robbery." He then asked for the manager who was in the back of the restaurant. When the manager came to the front of the restaurant the robber herded the employes and several patrons together,

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[1]The wanton endangerment convictions were reversed pursuant to a separate state ground on appeal. However, the sole basis for the reversal of Respondent's other state convictions in this case was the failure of the trial court to instruct the jury, upon request, as to the presumption of innocence.

taking money from the customers' wallets, and forcing the manager to give him the money from the safe. The robber then left this assembled group in a back room of the restaurant and made his escape. However, one of the customers had managed to sneak away unnoticed and called the police from another restaurant located across the street. Shortly thereafter, a police officer gave chase to an automobile departing the vicinity and ran it down when it struck a fire hydrant. Harold Whorton emerged from that automobile and pointed a pistol at the officer, but dropped it when commanded to do so. Whorton and a companion were taken at once to Jerry's restaurant where ten of the persons present during the robbery identified Whorton as the robber.

Whorton did not testify at his trial. The only evidence in his defense was given by his wife and her sister, who offered alibi testimony with regard to his whereabouts during the night on which the donut shot robbery occurred.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Kentucky has misinterpreted and incorrectly applied a prior decision of this Court, *Taylor* v. *Kentucky,* 436 U. S. ——, 98 S. Ct. 1930, —— L. Ed. 2d —— (rendered May 30, 2978), in the instant case. That court has interpreted "*Taylor* to mean that when an instruction on the presumption of innocence is asked for and denied there is reversible error." This interpretation requires *automatic reversal* in every such case regardless of the circumstances of the trial or the possible application of harmless error principles. We believe such an interpretation of *Taylor* v. *Kentucky* is wrong.

In *Taylor* v. *Kentucky,* 436 U. S. ——, 98 S. Ct. 1930, —— L. Ed. 2d —— (rendered May 30, 1978), this Court held that *under the facts* of that case a Kentucky conviction had to be reversed when a request for a presumption of innocence instruction had been refused by the trial court. On June 7, 1978, a week after the *Taylor* decision had been rendered by this Court, the instant case came before the Supreme Court of Kentucky for oral argument.[2] One of the issues in this case was whether the trial court erred in refusing to grant a requested instruction on presumption of innocence. The Supreme Court of Kentucky subsequently rendered its Opinion on July 25, 1978, in the instant case[3] and, with respect to the presumption of innocence instruction issue, stated as follows:

> "In *Taylor* a judgment of the Franklin Circuit Court was reversed because the trial court declined to instruct the jury that the law presumes

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[2]After the decision in *Taylor* v. *Kentucky* by this Court, but before the issuance of the opinion in the instant case by the Kentucky Supreme Court on July 25, 1978, the Kentucky Court of Appeals—an intermediate state appellate court—*affirmed* convictions in two cases involving requested instructions on presumption of innocence. *Gully* v. *Commonwealth,* File No. CA-2048-MR, and *Stewart* v. *Commonwealth,* File No. CA-1963-MR. These cases were not to be published, and are not cited here as authority, but to apprise this Court chronologically of the impact of *Taylor* v. *Kentucky* in the Commonwealth of Kentucky.

[3]The Supreme Court of Kentucky also reversed on the same day as the *Whorton* decision the cases of *Williams* v. *Commonwealth,* File No. 78-SC-68-MR and *Avery* v. *Commonwealth,* File No. 78-SC-75-MR by Memorandum Opinions. Petitioner intends to file Petitions for Writ of Certiorari in both cases.

a defendant innocent—and this despite the fact that on *voir dire* the jurors had already signified that they understood that proposition! If the trial court's 'truncated discussion of reasonable doubt . . . was hardly a model of clarity,' as remarked in *Taylor,* we must confess that we have a similar difficulty with the *Taylor* opinion itself.

The dissenting members of our court feel that the holding in *Taylor* is confined to the facts of the case. They draw that inference from the next-to-last sentence of the opinion (emphasis added): 'We hold that *on the facts of this case** the trial court's refusal to give petitioner's requested instruction in the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.'

Admittedly, the weight of the evidence against Whorton was far greater than it was against the defendant in *Taylor.* But does the Supreme Court actually mean to suggest that a defendant's right to the instruction can be made, ultimately, to stand or fall on the weight of the evidence in a given case? If so, then every case in which the trial court refused to give it will have to be decided according to the Chapman-Harrington harmless-error test. If that was the intention, it would have been considerate of the court to say so. It may be that the question of harmless error was not argued in that case, but 'a model of clarity' would have left a clean cut rather than a jagged stump. After all, it might reasonably have been foreseen that this court would have to apply the

*Footnote 4 from the *Whorton* Opinion reads as follows: "4 On what other facts an appellate court might rest its decision we hesitate to guess."

decision to a goodly number of other cases then in the process of appeal in this state, Whorton's being but one of them.

Those of us in the majority would like to be able to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid it might not stick. We know very well that in actuality *Taylor* was no more 'prejudiced' in his case than Whorton was in this one. Yet *Taylor* contains no hint that it might have been appropriate to consider whether the error was in fact prejudicial. To bring this discussion to a merciful end, we read *Talyor* to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error. If it means something short of that, we shall welcome further enlightenment from the only source that seems to be able either to construe or to amend the Constitution.

The judgment is reversed with directions for a new trial."

The aforementioned language in the opinion constituted an unexpected and surprise interpretation of *Taylor* v. *Kentucky* by the Supreme Court of Kentucky and petitioner thereafter filed a Petition for Rehearing and Modification which was subsequently denied on October 10, 1978. See Appendix, page 38. This Petition for Writ of Certiorari now results. Compare *Herndon* v. *Georgia,* 295 U. S. 441 (1935).

It is the position of the petitioner that the Supreme Court of Kentucky has misinterpreted the substance of *Taylor* v. *Kentucky* and has misapplied that case to the one at bar. This misinterpretation of *Taylor* v.

Kentucky poses a serious hindrance to the effective administration of criminal justice in Kentucky and will require the automatic reversal of numerous state criminal convictions.

In the instant case numerous eyewitnesses to the various offenses identified the respondent as the person who had committed those offenses. The evidence in the instant case is nothing short of overwhelming and is certainly much in contrast to the evidence that had been presented in the *Taylor* case. Moreover, unlike *Taylor* there is no suggestion in the case at bar that the prosecutor acted in an improper fashion during closing argument or at any other time. In *Taylor* the prosecutor's comments were thought to give rise to inferences of the accused's guilt. Such is not true in the case at bar. Nor, were there any harmful inferences made with respect to references in the indictment as in *Taylor*. And, there are no suggestions in this case of Whorton's status as a defendant tending in itself to establish his guilt like those that occurred in the *Taylor* case. Finally, the evidence at trial in this case, unlike *Taylor,* cannot be described as a mere swearing contest between victim and accused.

Perusal of the decision of this Court in *Taylor* v. *Kentucky* seems to indicate that that decision was based solely upon its rather unique and unusual facts. The numerous extraneous circumstances which occurred during the trial in the *Taylor* case were specifically noted by this Court and, when they were considered together, appeared to establish the basis for the violation of Taylor's constitutional rights. The

petitioner maintains that absent any similar such factual circumstances during trial, as in *Taylor,* no such constitutional violation would necessarily occur.

However, the Supreme Court of Kentucky has interpreted *Taylor* v. *Kentucky* to mean "that when an instruction on the presumption of innocence is asked for and denied there is a reversible error." Under the decision of the Supreme Court of Kentucky in the instant case the respondent's conviction in this case and in every case pending in Kentucky must be *automatically* reversed without regard to the circumstances of the case, the nature of the evidence adduced at trial, or the manner in which the case was prosecuted and defended by counsel or presided over by the trial court. The petitioner submits that this construction of *Taylor* v. *Kentucky* as set out by the Supreme Court of Kentucky in the *Whorton* case is incorrect and that this Court should grant a writ of certiorari to review this matter and to correct the misinterpretation. Compare *Republic Steel Corp.* v. *Maddox,* 379 U. S. 650, 652 (1965). Specifically, the judgment of the lower court should be reversed and vacated with respect to the *Taylor* issue and it should at least be reconsidered in light of applicable harmless error cases of this Court such as *Harrington* v. *California,* 395 U. S. 250 (1969), and *Chapman* v. *California,* 386 U. S. 18 (1967).[4]

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[4]In its Petition For Rehearing and Modification before the Supreme Court of Kentucky, the Petitioner estimated that between 20 and 80 criminal cases would be automatically reversed due to that court's interpretation of *Taylor* v. *Kentucky* in *Whorton* v. *Commonwealth.* Such automatic reversal under *Whorton* would also apparently apply to *Miller* v. *Kentucky,* No. 77-6912, wherein

(Footnote continued on following page)

It is the position of the petitioner that *Taylor* v. *Kentucky* does not mean that a state criminal conviction in Kentucky must be reversed automatically when a requested instruction on presumption of innocence is refused by the trial court. It is our belief that *Taylor* v. *Kentucky* does not create a rule of law requiring such an instruction as a *sine qua non* in Kentucky criminal cases.[5] In fact, it appears to the petitioner that under *Taylor* v. *Kentucky* any alleged federal constitutional impact of such an instruction, whether requested or not, would depend wholly on the circumstances of each criminal case and it would be only in those cases having exceptional circumstances, such as in *Taylor* v. *Kentucky,* where the absence of such instruction whether requested or not would result in a

(Footnote continued from preceding page)
this Court recently granted an accused's Petition for Writ of Certiorari on October 2, 1978 and reversed and vacated the judgment of the Supreme Court of Kentucky, ordering that case to be reconsidered in light of *Taylor* v. *Kentucky.* The Miller conviction had been affirmed by the state appellate court before this Court rendered its decision in *Taylor.*

[5]The Supreme Court of Kentucky amended Kentucky Rule of Criminal Procedure 9.56, effective July 1, 1978, requiring a presumption of innocence instruction in every criminal case. That Rule reads as follows:

"(1) In every case the jury shall be instructed substantially as follows: 'The law presumes a defendant to be innocent of a crime, and the indictment [or other accusatory document] shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty [and if you find him guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree.]'

"(2) The instructions should not attempt to define the term 'reasonable doubt'."

violation of an accused's right to due process under the Fourteenth Amendment to the United States Constitution. The Supreme Court of Kentucky in its Opinion in *Whorton* v. *Commonwealth* has clearly misinterpreted the decision of this Court in *Taylor* v. *Kentucky.*

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that this Court should grant a writ of certiorari in this case in order to rectify the misinterpretation and application by the Supreme Court of Kentucky of *Taylor* v. *Kentucky* in the case at bar.

Respectfully submitted,

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Counsel for Petitioner

PROOF OF SERVICE

I, Patrick B. Kimberlin, III, one of counsel for the petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, this 11th day of October, 1978, to Hon. Terrence R. Fitzgerald, Chief Appellate Defender, Jefferson District Public Defender, 200 Civic Plaza, 701 West Jefferson, Louisville, Kentucky 40202, Counsel for Respondent.

Patrick B. Kimberlin III

PATRICK J. KIMBERLIN, III
Assistant Attorney General

APPENDIX

SUPREME COURT OF KENTUCKY

RENDERED: JULY 25, 1978

78-SC-92-MR

HAROLD WHORTON - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Hon. S. Rush Nicholson, Judge
Indictment Nos. 157667, 157406 & 157391

OPINION OF THE COURT BY CHIEF JUSTICE PALMORE—REVERSING—Docketed July 25, 1978

Harold Whorton appeals from a judgment sentencing him to consecutive terms aggregating 230 years of imprisonment pursuant to a verdict finding him guilty on 10 counts of 1st-degree robbery, two counts of 1st-degree wanton endangerment, and two counts of 1st-degree attempted robbery.

The various charges grew out of three separate incidents. At a pre-daylight hour on May 15, 1976, a black male entered the Krispy Kreme Doughnut Shop in or near Shively carrying a pistol in one hand and a knife in the other. He proceeded to rob the store and three of its employes. The three employes later identified Whorton as the robber. Late in the evening of the same day a black male carrying a gun in one hand and a knife in the other entered and robbed the Burger Chef Restaurant on Shelbyville

Road. Two of the restaurant employes then present in the restaurant later identified Whorton as the robber. On June 1, 1976, around midnight, a man came into Jerry's Restaurant on Brownsboro Road and, after ordering two cheeseburgers, stuck a gun in the face of the waitress, announced that "this is a robbery," and asked for the manager, who was in the back of the restaurant. When the manager came up front the robber herded all of the patrons and employes together, took the money from the customers' wallets, forced the manager to give him the money from a safe, and left the assembled company together in a back room before leaving. Meanwhile, however, one of the customers managed to sneak away unnoticed and called the police from another restaurant across the street. Shortly thereafter a police officer gave chase to an automobile departing the vicinity and ran it down when it struck a fire hydrant. Whorton emerged from the automobile and pointed a pistol at the officer, but dropped it when commanded to do so. Whorton and a companion were taken at once to Jerry's Restaurant, where 10 of the persons present during the robbery identified whorton as the robber.

During the episode at Jerry's Restaurant, while he was directing the employes and patrons into the rear area of the premises, Whorton said, "If you don't think I'll shoot you, I'll prove it," and fired a shot into the ceiling. This particular act on his part was the basis for one of the wanton endangerment charges (the other endangerment count was for pointing a gun at the arresting officer), pursuant to which he was sentenced to five years in the penitentiary.

Whorton did not testify. The only evidence in his defense was given by his wife and her sister, who offered alibi testimony with regard to his whereabouts during the night on which the doughnut shop robbery occurred.

Prior to the trial Whorton moved, among other things, that the issues of guilt or innocence be submitted to the jury separately from the fixing of the penalty or penalties, in order that he might appear as a witness only at the second stage for the purpose of showing mitigating circumstances, including his valorous military service during the Korean Conflict. Although neither our statutes nor rules of court authorize such a bifurcation except in persistent-offender and capital cases (cf. KRS 532.080, KRS 532.025), he contends that the trial court's refusal to grant it deprived him of a fair trial.

At the close of the evidence and before the jury was instructed, counsel for Whorton tendered several federal-court type instructions which the trial court declined to give. One of these, undertaking to define reasonable doubt, was as follows:

"A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. The meaning of the rule is that the proof must be such as to exclude, not every hypothesis or possibility of innocence, but any fair and rational hypothesis except that of guilt; what is required is not an absolute or mathematical certainty but a moral certainty. An accused is not to be convicted on mere suspicion or conjecture. A reasonable doubt may arise, not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, an accused has the right to rely upon failure of the prosecution to establish such proof. (An accused may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.) The law does not impose upon an accused the duty of producing any evidence. A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jury mem-

bers do not feel convinced to a moral certainty that an accused is guilty of the offense(s) charged."

Another, instructing on the presumption of innocence, and substantially similar to the one offered and refused in Taylor v. Kentucky, U. S. (1978), was as follows:

"The law presumes an accused to be innocent of crime. He begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit an accused unless the jury members are satisfied beyond a reasonable doubt of the accused's guilt from all the evidence in the case."

As given by the trial court, each of the instructions covering the various charges submitted to the jury authorized a finding of guilt only if the jury believed, (a) from the evidence and (b) beyond a reasonable doubt, that the defendant had committed the acts, with the requisite criminal intent, that constituted the respective offense. In addition, and as directed by RCr 9.56,[1] the jury was specially instructed that if upon the whole case it had a reasonable doubt as to the defendant's guilt it was required to find him not guilty and, as to those charges on which the instructions embraced more than one degree of the offense, that if it found the defendant guilty but had a reasonable doubt as to the degree it was required to find him guilty of the lower degree. The special instruction on reasonable doubt defined the term as "a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proven but whether, after hearing all the evidence, you actually doubt that the defendant is guilty." This definition originated, of course, from a passage contained in Merritt v. Commonwealth, Ky., 386 S. W.

[1]In view of Taylor v. Kentucky, ____ U. S. ____ (1978), RCr 9.56 was amended as of July 1, 1978, to require inclusion of the presumption of innocence.

2d 727, 729 (1965). It was specifically approved for inclusion as a part of the instructions for criminal cases in Whitaker v. Commonwealth, Ky., 418 S. W. 2d 750, 752 (1967), and subsequently has been upheld in numerous cases.[2]

With regard to the request for a bifurcated trial, the argument is that the 5th-Amendment right of silence is diluted, or "chilled," by the fact that if a defendant elects to avail himself of its protection he pays a penalty in not being able to give mitigating testimony pertinent only to the amount of punishment in event of his conviction. We discussed a closely-related problem in Brown v. Commonwealth, Ky., 551 S. W. 2d 557, 559-560 (1977), in which a defendant tried in a bifurcated persistent-offender proceeding asserted the converse proposition that his right to testify in his own behalf during the first stage of the trial would be unconstitutionally diminished by use in the second stage of information elicited from him through cross-examination at the first stage. And our answer here is much the same as it was there. In this state both functions, the finding of guilt and the fixing of punishment, always have been performed by the jury. There is no constitutional requirement that it be otherwise, or that the two be performed by different juries. So, when they are performed by the same jury the defendant simply must weigh the good he can do against the harm he may bring upon himself by electing to testify. As observed in *Brown*, the state's right of cross-examination is a chilling specter for the defendant to contemplate in any criminal case. We doubt, however, that even the Supreme Court of the United States is ready to declare that it violates the 5th Amendment. Needless to say, this court is not.

[2]Also in view of Taylor v. Kentucky, *supra*, n.1, RCr 9.56 has been amended to caution against any attempt to define "reasonable doubt."

The right of cross-examination to which a defendant submits himself by testifying in his own behalf exists for the protection of the people at large. It is an indispensable countervailing factor in the adversary system. What the appellant asks us to do here is to trim it down, by confining it to the particular subject on which he chooses to testify. Logically, it would be the same for an accused rapist to insist that he be permitted to testify that he did not steal the victim's purse without submitting himself to questioning as to whether he raped her. The 5th Amendment gives him no such protection. He may not, by selecting the subject upon which he chooses to testify, use his constitutional right of silence to shield him against cross-examination on other subjects that are relevant to the case as a whole.

We agree that under the rationale of Sherley v. Commonwealth, Ky., 558 S. W. 2d 615 (1977), Whorton's use of a pistol in firing a shot into the ceiling of Jerry's Restaurant did not constitute an offense separate from the 1st-degree robbery charge for which he was being tried and was convicted. Two of the three elements listed by KRS 515.020 (1) as elevating robbery to the righest degree are (1) being armed with a deadly weapon or (2) using or threatening to use a dangerous instrument. Though not every "dangerous instrument" is a "deadly weapon," a "deadly weapon" ordinarily is a "dangerous instrument" as well. Hence both of these elements were proved in this case. That is, Whorton could have been found guilty of 1st-degree robbery either on the basis of his having been armed with a deadly weapon or on the basis of his having used or threatened to use that weapon. Neither, however, can be split off from the other and be treated as a separate offense. It was error to submit to the jury the charge of wanton endangerment growing out of the firing of a shot into the ceiling.

We shall not undertake to discuss at length the definition of reasonable doubt offered by Whorton as against the one given by the trial court. The point was noticed by a

faint lifting of the skirt in Taylor v. Kentucky, U. S. (1978), wherein it was observed that the definition given by the trial court "though perhaps not in itself reversible error, often has been criticized as confusing." It probably is beyond cavil that in the field of law many things are confusing to some, and that some things, among them a good sample of opinions by the United States Supreme Court itself, are confusing to all. We are at a loss to comprehend how a doubt may be considered "reasonable" if it is without substance, and therefore is insubstantial. The definition of "reasonable doubt" that has been approved by this court in recent years was borne of courtroom experience and discussion with jurors who had freshly emerged from the task of wrestling with an intangible concept, and who quite often were disposed to equate the term with "any shadow of a doubt," or with a querulous sense of disappointment that somehow the prosecution had not proved its case to the degree that the jurors could arrive at a verdict without perspiring. Be that as it may, we now throw in the towel. As noted in Merritt v. Commonwealth, Ky., 386 S. W. 2d 727, 729 (1965), we were never so presumptuous anyway as to believe that where others had failed we might succeed. The long and short of it is that we can no longer approve this definition, but unless and until the highest judicial authority is willing to hold it constitutionally fatal, neither will this court do so. Under the circumstances, we are of the opinion that the jury in this case was sufficiently and properly instructed on the subject.

From time immemorial the emphasis with regard to jury instructions in this state has been placed on simplicity. "The function of instructions in this jurisdiction is only to state what the jury must believe from the evidence (and in a criminal case, beyond a reasonable doubt) in order to return a verdict in favor of the party who bears the burden of proof." Webster v. Commonwealth, Ky., 508 S. W. 2d 33, 36 (1974). Thus we have sought to avoid abstract legal

principles, presumptions,[3] comments on the weight of the evidence, and references to the burden of proof, which is cast by the form of instruction requiring that in order to make an affirmative finding the jury must, on the basis of the evidence, believe certain specified facts to be true. This approach minimizes the possibility of intrusion by the judge into that particular area of decision-making which belongs exclusively to the jury, and it minimizes the possibility of error in that respect. Many lawyers and some judges, including the writer of this opinion, abhor the system that prevails in the federal trial courts, where at the close of the evidence the judge assumes the pulpit and turns preacher, droning out sweaty reams of boilerplate that few jurors really could be expected to digest.

Any thought that our form of instructions might have been designed for the simple-minded would be absurd. Its philosophy is to keep the jury strictly in its place, to keep the judge strictly in his place, to facilitate uniformity, to minimize error, and to avoid prolixity.

To abdicate this wholesome philosophy and flee to the soporific style of the federal courts for the mere sake of taking a step toward nationwide homogeneity would be regrettable. If there is to be a uniform system for the country, better might we entertain the hope that some consideration be given to the proposition that ours may be the preferable choice. Although the Supreme Court's reference to the instructions in *Taylor* as "skeletal" and "Spartan" may not have been so intended, it was more of a compliment than a slur. Indeed, we ourselves have said that instructions ought to provide "only the bare bones." Cox v. Cooper, Ky., 510 S. W. 2d 530, 535 (1974). To suggest that they are undernourished simply because they so appear in comparison with the bloated and cumbersome instructions

[3]See Mason v. Commonwealth, Ky., ____ S. W. 2d ____ (April 11, 1978), in which future reference to the presumption of sanity was proscribed.

customarily given in the federal courts is nothing less than a symptom of myopia.

In *Taylor* a judgment of the Franklin Circuit Court was reversed because the trial court declined to instruct the jury that the law presumes a defendant innocent—and this despite the fact that on *voir dire* the jurors had already signified that they understood that proposition! If the trial court's "truncated discussion of reasonable doubt . . . was hardly a model of clarity," as remarked in *Taylor*, we must confess that we have a similar difficulty with the *Taylor* opinion itself.

The dissenting members of our court feel that the holding in *Taylor* is confined to the facts of the case. They draw that inference from the next-to-last sentence of the opinion (emphasis added): "We hold that *on the facts of this case*[4] the trial court's refusal to give petitioner's requested instruction in the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment."

Admittedly, the weight of evidence against Whorton was far greater than it was against the defendant in *Taylor*. But does the Supreme Court actually mean to suggest that a defendant's right to the instruction can be made, ultimately, to stand or fall on the weight of the evidence in a given case? If so, then every case in which the trial court refused to give it will have to be decided according to the Chapman-Harrington harmless-error test. If that was the intention, it would have been considerate of the court to say so. It may be that the question of harmless error was not argued in that case, but "a model of clarity" would have left a clean cut rather than a jagged stump. After all, it might reasonably have been foreseen that this court would have to apply the decision to a goodly number of

[4]On what other facts an appellate court might rest its decision we hesitate to guess.

other cases then in the process of appeal in this state, Whorton's being but one of them.

Those of us in the majority would like to be able to hold that this newly-declared constitutional requirement is subject to the harmless-error rule, but we are afraid it might not stick. We know very well that in actuality Taylor was no more "prejudiced" in his case than Whorton was in this one. Yet *Taylor* contains no hint that it might have been appropriate to consider whether the error was in fact prejudicial. To bring this discussion to a merciful end, we read *Taylor* to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error. If it means something short of that, we shall welcome further enlightenment from the only source that seems to be able either to construe or to amend the Constitution.

The judgment is reversed with directions for a new trial.

All concur except for Clayton and Stephenson, JJ., who dissent.

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RENDERED: JULY 25, 1978

SUPREME COURT OF KENTUCKY

78-SC-92-MR

HAROLD WHORTON - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable S. Rush Nicholson, Judge
Nos. 157,667—157,406—157,391

CONCURRING OPINION BY JUSTICE LUKOWSKY

I concur with my brothers in the result we reach in this case. However, it seems to me that this case provides a forum in which we should articulate the paradoxical philosophies with which we are besieged and propose a course of action to minimize the problems which they create.

In the field of criminal procedure we have observed a decisional process by the Supreme Court of the United States which has crushed the status of the several states as "insulated chambers" of legal experimentation.[1] The fuel which has fed this juggernaut is the concept that the due process clause of the Fourteenth Amendment of the Constitution of the United States makes the First, Fourth,

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[1]Truax v. Corrigan, 257 U. S. 312, 343 (Holmes J., dissenting) (1921).

Fifth, Sixth and Eighth Amendments of that document binding upon the several states.

The purpose of this discussion is not to ascertain whether this fuel is historically distilled[2] or artifically synthesized.[3] Rather it is to examine the path made by the steamroller and determine how it may be traveled most smoothly.

Most of the path in Kentucky was free of obstacles because the federal constitutional rules imposed by these decisions were in force here as matters of state law long prior to their enunciation by the Supreme Court of the United States.[4] However, as the Supreme Court continues its journey it digs deeper in the terrain of state procedure, destroys traditional state perogatives[5] and causes adjust-

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[2]The historical validity of this rationale is supported by Hutchinson, The Foundations of the Constitution (1975) and Gora, Due Process of Law (1977).

[3]The historical validity of this rationale is undermined by Meyer, The History and Meaning of the Fourteenth Amendment, Judicial Erosion of the Constitution Through the Misuse of the Fourteenth Amendment (1977) and Berger, Government by Judiciary, the Transformation of the Fourteenth Amendment (1977).

[4]*Compare:* Mapp v. Ohio, 367 U. S. 643 (1961) *with* Youman v. Commonwealth, 189 Ky. 152, 224 S. W. 860 (1920) (suppression of evidence illegally obtained); Gideon v. Wainwright, 372 U. S. 335 (1963) *with* Turner v. Commonwealth, 89 Ky. (7 Bush) 78, 81, 1 S. W. 475, 476 (1886) and Holland v. Commonwealth, 241 Ky. 813, 45 S. W. 2d 476, 477 (1932) (indigent's right to appointed counsel in serious criminal cases); Duncan v. Louisiana, 391 U. S. 145 (1968) *with* Constitution of Kentucky Sec. 11 (1891) (right to trial by jury); Ballew v. Georgia, ____ U. S. ____, 46 U.S.L.W. 4217 (1978) *with* Constitution of Kentucky Sec. 248 (1891) (permissible size of juries); Jackson v. Denno, 378 U. S. 368 (1964) with KRS 422.110(2) (1942) (method of determination of admissibility of confessions); Coker v. Georgia, 433 U. S. 584 (1977) *with* KRS 510.040(2) and 532.030 (1975) (imposition of the death penalty for rape).

[5]*See, e.g.,* In re Gault, 387 U. S. 1 (1967) (constitutionalization of juvenile procedures); Furman v. Georgia, 408 U. S. 238 (1972); Roberts v. Louisiana, 428 U. S. 325 (1976); Gregg v. Georgia, 428 U. S. 153 (1976) (procedure for invoking death

(Footnote continued on following page)

ments to be made which are of uncalculated impact. The court has also chosen to examine but has refrained so far from disturbing other state procedural devices.[6] It is fair to say that this process has nationalized criminal procedure,[7] even thought there are those who would dispute this conclusion.[8] The course of the Burger court is not significantly different from that of the Warren court, except that it has limited the use of federal habeas corpus as a method of enforcing these newly promulgated constitutional rights.[9]

State systems of criminal procedure are like delicate Swiss watches. They are designed to equally balance the rights of the parties. When the balance is externally disturbed the shockwave requires a reevaluation and readjustment of the entire system.

(Footnote continued from preceding page)

penalty); Coleman v. Alabama, 399 U. S. 1 (1970) (right to counsel at preliminary hearing); Henderson v. Morgan, 426 U. S. 637 (1976) (guilty plea procedure); Chambers v. Mississippi, 410 U. S. 284 (1973) (evidentiary rules); Tate v. Short, 401 U. S. 395 (1971) (indigents not subject to imprisonment for non-payment of a fine); Herring v. New York, 422 U. S. 853 (1975) (closing argument at trial required); Wardius v. Oregon, 412 U. S. 470 (1973) (notice of alibi rule requires reciprocal discovery).

[6]*See, e.g.,* Chaffin v. Synchcombe, 412 U. S. 17 (1973) (jury sentencing permissible); McGautha v. California, 402 U. S. 183 (1971) (bifurcated trial not required); Lego v. Twomey, 404 U. S. 477 (1972) (voluntariness of a confession may be determined by the trial judge on a preponderance of the evidence standard and need not be redetermined by the jury); Johnson v. Louisiana, 406 U. S. 356 (1972); Apodaca v. Oregon, 406 U. S. 404 (1972) (unanimous verdict not required); McKeiver v. Pennsylvania, 403 U. S. 528 (1971) (juveniles have no right to a jury in a delinquency trial).

[7]*E.g.,* Pye, The Warren Court and Criminal Procedure, 67 Mich. L. Rev. 249 (1968); Meador, Are We Heading for a Merger of Federal and State Courts?, 17 The Judges' Journal, No. 2, 9 (1978).

[8]*E.g.,* Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965); Burger, To Weaken Our State Courts Is to Destroy Federalism, 17 The Judges' Journal, No. 2, 10 (1978).

[9]Wainwright v. Sykes, 433 U. S. 72 (1977); Stone v. Powell, 428 U. S. 465 (1976).

Taylor v. Kentucky, ____ U. S. ____, 46 U.S.L.W. 4528 (1978), provides a perfect example. The case in effect establishes the principle that the due process clause of the Fourteenth Amendment requires a state trial judge to instruct the jury on the presumption of innocence when requested by a criminal defendant. The system of instructing juries developed in Kentucky prohibits instructions on presumptions and permissible inferences. The theory is that to avoid undue influence by the trial judge on the fact finding process for or against either party the instructions should simply focus the attention of the jury on those ultimate facts which it must decide in order to reach a verdict. Consequently, the instructions are skeletal in form, given prior to closing argument and leave to the lawyers the task of fleshing them out in closing argument insofar as the evidentiary facts of the case, the weight of the evidence and the credibility of the witnesses are concerned.

This rule was a two-edged sword and cut equally for and against both sides of the case. For example, we recently held that the Commonwealth was not entitled to an instruction on either the presumption of sanity or the presumption of knowledge which arises from the possession of recently stolen goods. Mason v. Commonwealth, Ky., ____ S. W. 2d ____ (1978); Wells v. Commonwealth, Ky., 561 S. W. 2d 85 (1978). Obviously, Taylor, *supra,* requires the restoration of balance to the rights of the parties. No thought was given to this aspect of the problem by those who mandated the change because they were neither conversant with the operation of the system, nor responsible for its maintenance.

A trial is no more than a search for the truth. The method by which that search is conducted is of little import so long as it is rational, fair to all parties and civilized. The concept of a national mode of criminal procedure is not too unpalatable to be swallowed in America a century after the Civil War. The Supreme Court of the United States has

made it clear that it will no longer pay homage to "federalism" by permitting the states to experiment with an ever lengthening list of new found "fundamental" rights of defendants in criminal cases.[10]

We should abandon the absolute fortresses of local criminal procedure. Their unique character may be matters of pride, but their use does not so improve the search for the truth as to justify the time and energy lost in their defense. The litigation they spawn diffuses our efforts to apply, develop, and interpret substantive law and subordinates the question of guilt or innocence to the justification for the retention of local practices.

I would end the conflict and equalize the position of the parties now by:

1. Amending our Rules of Criminal Procedure to conform as closely as possibly with the Federal Rules of Criminal Procedure including:

(a) Permitting the trial judge to charge the jury orally after closing argument and to comment on the weight of the evidence and the credibility of the witnesses.[11] *Contra,* RCr 9.54(1).

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[10] *Compare* Crist v. Bretz, ____ U. S. ____, 46 U.S.L.W. 4639 (1978) *with* Graham v. Commonwealth, Ky., 562 S. W. 2625 (1978) *and* Cross v. Commonwealth, 270 Ky. 537, 109 S. W. 2d 1214 (1937) (when jeopardy attaches).

[11] This change has been advocated in civil as well as criminal cases on state constitutional grounds. Lukowsky, The Constitutional Right of Litigants to Have the State Trial Judge Comment Upon the Evidence, 55 Ky. L. J. 121 (1966). There are those who maintain that this should not be permitted because state trial judges are not as able as their federal counterparts. It must be remembered that federal judges are "appointed" not "annointed." There is no valid reason why the political accident that a man is a federal rather than a state judge should make him more competent, or conscientious, or learned that his opposite number in the state courthouse. Stone v. Powell, *supra* n. 6, at 493 n. 35. Three of the six United States district judges presently sitting in Kentucky were appointed to their posts while they were sitting as judges of the Circuit Court of Kentucky. This method of instructing juries is in satisfactory use in fourteen states. Lukowsky, *supra,* at 125 n. 12.

(b) Abandoning the rule that a conviction may not be based on the uncorroborated testimony of an accomplice. *Contra,* RCr 9.62.

(c) Requiring the trial judge to fix all penalties other than death upon conviction. *Contra,* RCr 9.84.

(2) Adopting the Federal Rules of Evidence in toto, at least for use in criminal cases.[12]

This approach would insure that if the Supreme Court of the United States should reverse a Kentucky case on procedural grounds it would have to dine on a procedure, which it prepared and we could take comfort in the lament of the homemaker that the dullest food is that which you cook yourself.

[12]*Compare* Chambers v. Mississippi, *supra* n. 5 *with* Crawley v. Commonwealth, Ky., ____ S. W. 2d ____ (1978).

RENDERED: JULY 25, 1978

SUPREME COURT OF KENTUCKY

78-SC-92-MR

HAROLD WHORTON - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable S. Rush Nicholson, Judge
Nos. 157,667—157,406—157,391

CONCURRING OPINION BY JUSTICE REED

I join the majority opinion to the extent it holds that the only reversible errors presented were the trial judge's refusal to comply with the submitted request of the appellant for an instruction on the "presumption" (more properly, assumption) of innocence, and his submission to the jury of the charge of wanton endangerment growing out of the firing of a shot into the ceiling despite appellant's objection that the submission constituted an impermissible multiplicity. I do not, however, agree with some of the observations made in the majority opinion, although I do thoroughly agree with other statements made therein.

When the trial judge refused to instruct on the "presumption" of innocence, he followed the settled law of this state. That law redounded to the benefit of criminal defendants in many instances where an evidentiary presumption favored the prosecution's case. If the Kentucky system

of jury instructions in criminal cases is now to become one where "presumptions" favorable to defendants must be given but there shall be no instructions on "presumptions" favorable to the prosecution, then the entire procedure is way out of balance and the interests of society to protect the innocent victims of crime and to punish and to prevent the repetition of dangerous and sometimes fatal criminal activity are critically denigrated.

I am in substantial agreement with most of what is said in my brother Lukowsky's concurring opinion. I am persuaded, however, that the United States Supreme Court is not the only agency seeking to impose a gray blanket of national uniformity on the court systems of the several states. So-called national "standards," "guidelines" and "goals" are poured forth without much, if any, consideration given to the experience, record and workability of individual state systems, more particularly those not represented on the frequently formed "conferences," "committees," "commissions," "sections," and "task forces," which with boring frequency are usually composed of the same people who apparently nominate each other for inclusion in the proliferating projects. It taxes one's credibility to conclude that these individuals possess expertise in so many diverse areas.

I do not share the asperity of the majority concerning the federal trial method. After all, it has delivered a good and acceptable product of justice in Great Britain for a long time and fourteen states of the Union are using it with results satisfactory to them. I disagree with my brother Lukowsky that it is either necessary or desirable for a trial judge to comment on the credibility of witnesses or for us to swallow indiscriminately the complete Federal Code of Evidence to assure federal acceptance of our system's results or to provide a fairer system than we have.

My present uneasiness about our jury instruction methods is that they are too complicated rather than too

"sparse" or "truncated." I would prefer letting a trial judge explain in concise layman's language, in all places possible, what a jury's function is and to relate it to the particular case on trial. I would recommend that this procedure be used by the judge at the commencement of trial and after final arguments have been completed. This procedure basically is nothing more than an adaption and extension of the interrogatories to the jury provisions we already have in our procedural rules for civil cases.

SUPREME COURT OF KENTUCKY

78-SC-92-MR

HAROLD WHORTON - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable S. Rush Nicholson, Judge
Indictment Nos. 157667, 157406 & 157391

DISSENTING OPINION BY JUSTICE CLAYTON

I believe that the result in *Taylor* v. *Kentucky*, ___ U. S. ___ (1978), was meant to, and that it should, be limited to factual situations similar to the one in that case, and I am greatly surprised and disappointed that the majority of my brothers do not agree.

It should be noted from the outset that although I too resent the *Taylor* decision because it represents yet another encroachment by the United States Supreme Court upon the once hallowed ground of state procedural law, I hardly see how we can take offense at the principle espoused therein. The notion that a man is presumed innocent until proven guilty is every bit as firmly embedded in the criminal law of Kentucky as in its federal counterpart, and in light of the recent revelation that over a third of all Americans believe it is the responsibility of the accused to prove

his or her innocence,* it might be a good idea to remind jurors of this fundamental rule.

Whether an instruction on the presumption of innocence should be given whenever requested, however, is not the question before us. Rather, the question which must be answered is whether the failure to do so automatically constitutes reversible error in every case. Those who join in the majority today answer this query in the affirmative, alleging that they would like to be able to hold the requirement enunciated in *Taylor* subject to the harmless-error doctrine, but asserting that they cannot because "Taylor contains no hint that it might [be] appropriate to consider whether [a failure to instruct on the presumption] is in fact prejudicial." Apparently their hearts were not really in it when they embarked upon the hunt.

Not once, but three times the clue the majority says it is searching for appears in the Taylor opinion, the Supreme Court initially referring to the "cumulative effect of the potentially damaging *circumstances of this case*," and the "particular need for such an instruction *in this case*" and concluding by stating that "[w]e hold that *on the facts of this case* the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." ___ U. S. at ___ n. 15, ___, and ___ (emphasis added). I submit that it is apparent from these passages that the Supreme Court fully intended to limit *Taylor* to its facts. Although certainly not determinative of the issue, this position is hardly undermined by the comment of the dissenters in Taylor that "[i]n some cases the omission [of an instruction on the presumption of innocence] may be

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*According to a comprehensive national survey conducted by the National Center for State Courts, the actual figure is 37%. *See* Lawscope: State Courts Seeking to Draw Blueprint for the Future, 64 *A.B.A. Journal* 653 (May 1978).

fatal, but the court wisely avoids holding that this is always so." ____ U. S. at ____ (Stevens, J., dissenting).

Far more important than the appearance of those specific passages, however, is the thrust of the *Taylor* decision as a whole. As I read the majority opinion in that case, there are three significant points to be derived therefrom: first, that instructions on the presumption of innocence and reasonable doubt do not necessarily perform the same function—although both instructions inform the jury *who* has the burden of establishing guilt (the prosecution), the instruction on the presumption of innocence tells the jury *how* that guilt must be proven (by legal evidence only), while the instruction on reasonable doubt tells the jury *how much* proof is required; secondly, that the crucial question in determining whether there is any "purging" function to be performed by an instruction on the presumption is whether there exists "a genuine danger that the jury [might] convict [the accused] on the basis of extraneous consideration, rather than on the evidence introduced at trial," ____ U. S. at ____—in *Taylor* the extraneous circumstances cited as creating a need for this purging effect were the prosecutor's reading of the indictment to the jury and his remarks during summation implying that the mere fact Taylor had been charged with a crime was evidence of his guilt; and finally, and most importantly for our purposes, that in answering the preceding question, the level of danger can be affected by the weight of the evidence for or against the accused—in Taylor the court specifically found that the risk was "heightened because the trial was essentially a swearing contest between the victim and the accused." *Id.*

If the danger that the jury might convict the accused on the basis of extraneous matters is increased where the case is close on the evidence, surely that danger must be decreased where the evidence against the accused is overwhelming in relation to the evidence in his favor. In the

case at hand, the indictment against Whorton was read into the record in the presence of the jury unaccompanied by an admonition that it was not to be considered as evidence. Immediately thereafter, there followed a parade of fifteen eyewitnesses who positively identified Whorton as the perpetrator of the crimes charged therein. Under these circumstances, I simply cannot believe there is any real possibility that the reading of the indictment could have affected either the jury's determination of guilt or punishment.

In closing I wish to emphasize that I do not believe that either *Taylor* or the decision reached by the majority today disturbs the time-honored and salutary rule in this jurisdiction prohibiting instructions on presumptions and inferences. For as pointed out in *Taylor* itself, the presumption of innocence, unlike the presumption of knowledge from possession of recently stolen goods, for example, is not really a true "presumption"—i.e., a mandatory inference drawn from a fact in evidence—at all, but is rather merely an "assumption" to be indulged in the absence of evidence to the contrary. ____ U. S. at ____ n. 12.

I would affirm each of Whorton's convictions except that involving wanton endangerment, which I agree is reversible on double jeopardy grounds.

RENDERED: JULY 25, 1978

SUPREME COURT OF KENTUCKY

78-SC-92-MR

HAROLD WHORTON - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable S. Rush Nicholson, Judge
Indictment Nos. 157667, 157406 & 157391

DISSENTING OPINION BY JUSTICE STEPHENSON

I agree with the majority opinion to the extent of the holding that Whorton's use of a pistol in firing a shot into the ceiling of Jerry's Restaurant did not constitute a separate offense from the first-degree robbery charge. In all other respects I dissent.

The majority opinion oversimplifies my dissent. A careful reading of *Taylor* demonstrates to me that the failure to give a presumption of innocence instruction was held reversible error, primarly for the reason stated in *Taylor* that there was a risk that the jury would convict on the basis of the extraneous considerations mentioned in *Taylor* and "That risk was heightened because the trial essentially was a swearing contest between victim and accused." *Taylor* went on to state "the particular need for such an instruction in this case."

It is my view that with the equivocal language in *Taylor* the simple solution in this case is to apply the *Chapman-Harrington* test. Here we have three witnesses who identified Whorton in the robbery of the Doughnut Shop, two witnesses who identified Whorton in the robbery of the Burger Chef, ten witnesses who identified Whorton in the robbery of Jerry's and the arresting officers on the charge of wanton endangerment. The only defense offered at all was the testimony of Whorton's wife and sister who offered alibi testimony for the robbery of the Doughnut Shop. With Whorton not testifying we have a case for the prosecution that passes overwhelming evidence of guilt and reaches conclusive evidence of guilt. I do not believe that any thoughtful person would say that the failure to give a "presumption of innocence" instruction constituted unfair prejudice to Whorton. There can be no doubt at all that a conviction would have resulted if the instruction had been given; so, it follows that the error was harmless beyond a reasonable doubt, the basis of the Chapman-Harrington test.

Taylor does not pretend to hold that the constitutional right to a "presumption of innocence" instruction is so absolute that failure to give the instruction is reversible in all cases. It is my opinion that *Taylor* should be applied on a case by case basis depending on the circumstances in the particular case, and I am willing to handle the problem in this fashion rather than the rigid rule enunciated in the majority opinion which goes beyond the requirements of *Taylor*.

SUPREME COURT OF KENTUCKY

OPINION RENDERED JULY 25, 1978

HAROLD WHORTON

v.

COMMONWEALTH OF KENTUCKY

File No. 78-SC-92-MR

Appeal from Jefferson Circuit Court
Action No. 157406, 157667, 157391

MANDATE—Issued October 10, 1978

The Court being sufficiently advised, it seems the judgment herein is erroneous.

It is therefore considered that said judgment be reversed for proceedings consistent with the opinion herein; which is ordered to be certified to said court.

October 10, 1978 Appellee's Petition for Rehearing Denied.

(s) Martha Layne Collings
Clerk

SUPREME COURT OF KENTUCKY

File No. 78-SC-92-MR

HAROLD WHORTON - - - *Respondent-Appellant*

v.

COMMONWEALTH OF KENTUCKY - *Petitioner-Appellee*

Appeal from Jefferson Circuit Court
Hon. S. Rush Nicholson, Judge

PETITION FOR REHEARING AND MODIFICATION

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I hereby certify that a true copy of the within Petition for Rehearing and Modification has been mailed this 11th day of August, 1978, to Hon. S. Rush Nicholson, Judge, Jefferson Circuit Court, Hall of Justice, Louisville, Ky. 40202; Hon. David Armstrong, Commonwealth Attorney, Hall of Justice, Louisville, Ky. 40202; and Hon. Terrence R. Fitzgerald, Deputy Public Defender, 1000 Republic Bldg., Louisville, Ky. 40202, Counsel for Respondent-Appellant.

(s) Patrick B. Kimberlin, III
Assistant Attorney General

ARGUMENT

I.

This Court Erred in Determining That the Newly-Declared Constitutional Requirement of a Presumption of Innocence Instruction, When Requested, Is Not Subject to the Harmless Error Rule.

On May 30, 1978, the United States Supreme Court declared in *Taylor* v. *Kentucky, under the facts of that case,* that the refusal of the trial court to grant a requested instruction on presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Taylor* v. *Kentucky* (Slip Opinion, p. 12). Approximately one week later, on June 7, 1978, this Court held oral arguments in the instant case. Thereafter, on July 7, 1978, while this case was under submission, the Kentucky Court of Appeals rendered two opinions, not to be published as authority, rejecting the application of *Taylor* v. *Kentucky* and affirming the conviction of the accused in each case in light of the particular evidence and other characteristics which distinguish those cases from *Taylor.*[1]

On July 25, 1978, this Court rendered its Opinion in the instant case, giving thorough and thoughtful consideration to the recent case of *Taylor* v. *Kentucky, supra,* and the manner in which it affected the case at bar.[2] In its Opinion this Court concluded that the "newly-declared constitutional requirement" of a presumption of innocence instruction, when requested by the accused, must be given and if the

[1] *Gully* v. *Commonwealth*, File No. CA-2048-MR, and *Stewart* v. *Commonwealth*, File No. CA-1963-MR. (These cases are not cited as authority, but to apprise the Court chronologically of the impact of *Taylor* issues in this jurisdiction.) They are now pending on petitions for rehearing.

[2] This Court also reversed on that same day *Williams* v. *Commonwealth*, File No. 78-SC-68-MR and *Avery* v. *Commonwealth*, File No. 78-SC-75-MR, by Memorandum Opinion.

requested instruction is denied reversible error occurs. *Whorton* v. *Commonwealth,* Ky., ____ S. W. 2d ____ (Slip Opinion, p. 10). This Court considered but rejected the application of the *Chapman-Harrington* harmless error rule. The petitioner-appellee respectfully urges this Honorable Court to reconsider its holding insofar as the *Chapman-Harrington* rule is concerned and to modify its Opinion to hold that the *Chapman-Harrington* rule is applicable to this case.

CHAPMAN-HARRINGTON RULE

In *Chapman* v. *California,* 386 U. S. 18 (1967), the United States Supreme Court was confronted with a violation of an accused's constitutional rights under the Fifth and Fourteenth Amendments, but was requested to formulate and apply a harmless-error rule to the constitutional violation which would permit the conviction of the accused to be affirmed. In *Chapman* the accused urged the court to hold all federal constitutional errors, regardless of the facts and circumstances, to be deemed harmful requiring automatic reversal. The Supreme Court declined to adopt the accused's position and went on to formulate a harmless-error rule. The Supreme Court concluded that federal constitutional errors may be held harmless if the reviewing court is able to declare a belief that the error was harmless beyond a reasonable doubt. *Chapman* v. *California,* at 24.[3]

Two years later, in *Harrington* v. *California,* 395 U. S. 250 (1969), the Supreme Court affirmed the state conviction of an accused whose federal constitutional rights under the Sixth and Fourteenth Amendments had been violated at his state trial. The court, relying upon *Chapman,* applied the harmless-error rule and, when considering the overwhelming evidence presented at trial against the accused, con-

[3] In *Chapman* the conviction was reversed because the court was not of the opinion that the constitutional error was harmless beyond a reasonable doubt.

cluded that the federal constitutional violation would not require the reversal of his conviction. Thus, there is a clear policy enunciated by the United States Supreme Court, as reflected in the *Chapman-Harrington* rule, that outright violations of federal constitutional rights may be considered harmless depending upon the circumstances. The *Chapman-Harrington* rule has since been applied in nearly every jurisdiction, both state and federal, throughout the country.[4] With this in mind, the petitioner-appellee respectfully urges this Court to reconsider the facts of the case at bar in light of the harmless-error rule and also take note of the distinguishing characteristics between this case and *Taylor* v. *Kentucky*.

TAYLOR v. KENTUCKY

In its Opinion, this Court candidly acknowledges that a majority of its members would like to hold that the newly-declared constitutional requirement of a presumption of innocence instruction be subject to the harmless-error rule but hesitates to apply such a rule because "it might not stick." (Slip Opinion, p. 10). And, this Court questions whether the *Chapman-Harrington* harmless-error rule was intended to apply in a case such as this since the United States Supreme Court made no reference to that rule in its Opinion in *Taylor*. However, the petitioner-appellee respectfully urges this Court to avail itself of the *Chapman-Harrington* rule and apply it to the instant case.

If anything, the decision in *Taylor* v. *Kentucky* provides fertile ground for that rule to thrive with reference to cases such as the one at bar. The use of that rule will require consideration of cases such as the instant one on a case by

[4]In Kentucky, for example, this Court has seen fit to apply the *Chapman-Harrington* rule in such cases as *Burton* v. *Commonwealth*, Ky., 550 S. W. 2d 485, 488 (1977); *Cain* v. *Commonwealth*, Ky., 369 S. W. 2d 275 (1977); *Niemeyer* v. *Commonwealth*, Ky., 533 S. W. 2d 218, 221 (1976); also see *Watkins* v. *Commonwealth*, Ky., 465 S. W. 2d 245, 247 (1971).

case basis. But, this must be done in order that justice may be served. Petitioner-appellee estimates that there are approximately 22 cases involving *Taylor* issues currently pending before this Court or the Kentucky Court of Appeals. Moreover, petitioner-appellee would also estimate no fewer than 30 and perhaps as many as 60 or more cases throughout the Commonwealth involving *Taylor* issues which have yet to be appealed and briefed. As the *Whorton* Opinion currently stands, anywhere from 20 to perhaps 80 or more recent criminal convictions in this Commonwealth will have to be *automatically reversed*. Such a result does not serve the best interests of justice or the citizens of the Commonwealth *if* the harmless-error principle of *Chapman-Harrington* can be applied to these cases. Law students, lawyers and judges are very much aware of the adage that "good sense makes good law." Is it good sense to require automatic reversal in a large number of criminal cases, including the one at bar, where the very circumstances of each case, when considered on an individual basis, might require the application of the *Chapman-Harrington* rule and the affirmance of the conviction?

The consideration by the United States Supreme Court of the facts in *Taylor* v. *Kentucky* might best be described as unique. Perusal of that Opinion clearly establishes that the final determination of the violation of constitutional rights in refusing to give the requested instruction on presumption of innocence was predicated upon the numerous "extraneous circumstances" as noted by the Supreme Court. *Taylor* v. *Kentucky* (Slip Opinion, p. 10). Among those *extraneous circumstances*, as noted by the Supreme Court were:

1. the alleged skeletal instructions
2. the *possible* harmful inferences from references to the indictment

3. comments by the prosecutor, although not objected to, giving rise to inferences of the accused's guilt
4. suggestions of the accused's status as a defendant tending in itself to establish his guilt
5. the swearing contest between victim and accused. *Taylor* v. *Kentucky* (Slip Opinion, pp. 9-10).

It is the *facts* in the *Taylor* case which the Supreme Court again, and again, makes mention of and relies upon in establishing the basis of the constitutional violation in that case. The last paragraph of the majority opinion in that case simply crystalizes and acknowledges that the Opinion in *Taylor* was truly based *upon the facts of that case.*

Accordingly, this Court should not hesitate to apply the *Chapman-Harrington* rule to the instant case. The fact that that rule was not applied, or even mentioned, in *Taylor* is of course no consequence. Recourse to the briefs on the merits in *Taylor* indicate that the harmless-error rule was not brought to that court's attention. Similarly, petitioner-appellee has not urged upon this Court the application of the *Chapman-Harrington* rule until now. The application of that rule will provide true justice to both the accused and to the Commonwealth in any criminal case involving a presumption of innocence instruction.

The petitioner-appellee implores this Court to consider the evidence or record in the instant case where there are *three witnesses* who identified Whorton in the robbery of the Doughnut Shop, *two witnesses* who identified him in the robbery of the Burger Chef, *ten witnesses* who identified him at the robbery at Jerry's, and the arresting officers on the wanton endangerment charge. In defense, Whorton relied upon alibi testimony of relatives with respect to the robbery of the Doughnut Shop. This most surely constitutes overwhelming evidence of guilt. Under these circumstances, the petitioner-appellee respectfully requests this

Honorable Court to grant the Petition for Rehearing and to Modify its Opinion in the instant case applying the *Chapman-Harrington* rule hereto and affirming those convictions not otherwise reversed with respect to other issues in this case.

CONCLUSION

For the foregoing reasons, the petitioner-appellee respectfully requests this Honorable Court to grant the Petition for Rehearing and Modification.

Respectfully submitted,

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